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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1086

DELONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY, *Petitioners,*

v.

STATE OF OREGON, *by and through its* STATE HIGHWAY COMMISSION, *Respondent.*

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BERT B. RAND,
HANS A. NATHAN and
KIDDERS H. FRIEDMAN,
1730 K Street, Suite 308,
Washington, D.C. 20006

ARDEN E. SHENKER,
801 Standard Plaza,
Portland, Oregon 97204
*Counsel for Petitioners*

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Petitioners pray that this Court grant a rehearing of its Order of May 7, 1973, denying the petition for writ of certiorari, and that a rehearing be granted and a writ of certiorari issue.

## REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The following substantial grounds within the provisions of Rule 58.2 which have not been previously presented, are available to the petitioners:

**1. Effect of Recent Decisions Recognizing That the Appearance of Impropriety Effectively Deprives a Party of Due Process of Law.**

The highly unusual disclosure of covert activities engaged in by the Government in the Pentagon Papers trial of Daniel Ellsberg and Anthony J. Russo, Jr. prompted Judge W. Matt Byrne, Jr. of the United States District Court for the Central District of California to dismiss all charges against the defendants.

Although the court was unable to ascertain the effect the government's covert activities may have had on the government's case,[1] the Court, recognizing the overwhelming appearance of impropriety, held:

> "The totality of the circumstances of this case which I have only briefly sketched offend a sense of justice. The bizarre events have incurably infected the prosecution of this case."

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[1] "Much information has been developed, but new information has produced new questions, and there remain more questions than answers."

"Of more serious consequences is that the defendants and the court do not know the other activities in which the special unit may have been engaged and what has happened to the results of these endeavors."

"There is no way the defendants or the court or, indeed, the government itself can test what effect these interceptions may have had on the government's case."

(Unreported opinion. Excerpts from the official transcript of Judge Byrne's ruling appearing in the May 12th, 1973, issue of The Washington Post.)

In a recent decision of the Second Circuit affirming a decision of the District Court for the Southern District of New York disqualifying appellants' counsel on the ground that his representation of them constituted a breach of Canon 4 of the Code of Professional Responsibility, the Court held:

> "We have said that our duty in this case is owed not only to the parties—who by chance consist of a group of smaller competitors arrayed against the industry giant—but to the public as well. These interests require this court to exercise its leadership to insure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process. The stature of the profession and the courts, and the esteem in which they are held, are dependent upon the complete absence of even a semblance of improper conduct." *Emile Industries, Inc., et al.,* v. *Patentex, Inc. and Burlington Industries, Inc.,* Docket Nos. 72-2048-2053 (Decided May 9, 1973)

These decisions applying the appearance of impropriety test to the prosecution and to attorneys address themselves to the vital concerns of the public's acute interest in the scrupulous administration of justice. The ultimate administration of justice rests in the hands of the courts. While the public demands propriety from the prosecution from attorneys, it demands and, *a fortiori,* is entitled to the highest degree of fairness and impartiality from its judges. Yet, there remains a great paucity of decisions on disqualification of a judge because of a substantial business relationship with a party involved in a case before his Court. Extrajudicial discussions of the subject and various Bar Association guidelines are diffuse and inconsistent. Only this Court can give the necessary impetus to

satisfying the public's desire for a fair and impartial judiciary. This Court has never addressed itself to the bounds of judicial business dealings with parties likely to appear before a court. A strict prophylactic rule defining and limiting a judge's extrajudicial conduct is urgently needed.

**II. The New United States Judicial Conference's Code of Ethics for the Federal Judiciary Gives Rise to the Urgent Need for Clarification by the Court as to What Action Constitutes an Appearance of Impropriety.**

The United States Judicial Conference chaired by Chief Justice Warren E. Burger, adopted the first code of ethics in history directly applicable to the federal bench. The new Code states that borderline areas of disqualification will be governed by the precept, embodied in the ABA's ethical canons since 1924 but never before contained in a federal judicial rule, that regard for the appearance of propriety should induce judges to step out of doubtful cases. It is submitted that jurists today feel that they have a duty to sit unless clearly disqualified. The Conference's edict that judges should disqualify themselves where the appearance of propriety is in doubt furnishes little guidance as to the type of conduct that would call for disqualification. A decision by this Court requiring disqualification of a judge who engages in a substantial and undisclosed business relationship with a party appearing before him would go a long way toward furnishing guidance to the State Bench and furthering the public's interest in an impartial judiciary.

Nowhere is Shakespeare's observation that "there is nothing either good or bad but thinking makes it so,"

more worthy of consideration than in the realm of the ethical conduct of the courts. With the ebbing tides of public support for our institutions at a crisis level, petitioners urge upon the Court that it assert its unique leadership in assuring an impartial judiciary.

Respectfully submitted,

BERT B. RAND,
HANS A. NATHAN and
KIDDERS H. FRIEDMAN,
1730 K Street, Suite 308,
Washington, D.C. 20006

ARDEN E. SHENKER,
801 Standard Plaza,
Portland, Oregon 97204
*Counsel for Petitioners*

**CERTIFICATE OF COUNSEL**

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and that the Petition is restricted to those grounds described in Rule 58 of this Honorable Court.

HANS A. NATHAN
*Counsel for Petitioners*

Dated: May 30, 1973

Hans A. Nathan
KHF